IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No. 382 of 2007
in
Company Petition No.419 of 2006

Exposure Insurance Services Ltd
a Public Limited Company
incorporated under the laws of
Kingdom and having its Registered
office situated at 3, Warners Mill
Silks Way, Brain Tree, Essex CM7
3GB United Kingdom. ..Appellants .

Vs

M/s Larsen & Toubro Ltd.
A Public Limited Company
incorporated under the Companies
Act of 1956 and having its
registered office at L & T
House, Ballard Estate
Mumbai 400038 Maharashtra ..Respondents

Mr D.D. Madon, Senior Advocate with Mr Punit B Anand
for the Appellants
Mr. Pankaj Sawant with Mr. Vikram Trivedi, Mr. Sachin Chandarana
and Mr. Mayur Bhojwani i/b M/s Manilal Kher Ambalal & Co
for respondents .

CORAM: SWATANTER KUMAR,C.J.,&
SMT RANJANA DESAI, J.

Judgment reserved on July 2, 2007
Judgment pronounced on 19th July 2007

JUDGMENT(Per Swatanter Kumar, C.J.):

1. This company appeal is directed against the order passed by the Learned Company Judge on 21st March 2007. The

appellant company had filed a winding up petition against the respondent company on the ground that the respondent company is unable to pay its debts. The pleaded case of the appellant company is that it was holder in due course of two bills of exchange dated 15th December 2002 for an amount of US $ 2,165,000.00. They were endorsed in favour of the appellant company on 28th January 2003. The bills of exchange were payable on 15th March 2003. Thus the appellants invoked the jurisdiction of the Company Court on the basis of the endorsed bills. The respondents in their defence pleaded that nothing was payable in respect of the two bills of exchange as the supplier had issued two credit notes dated 27th February 2003 to the appellants; that the goods supplied had been received back and consequently there was no amount outstanding against the invoices and bills of exchange. The respondent company then also pleaded that the notice dated 4th February 2005 had been withdrawn by the petitioner company and as such no cause of action subsists. The claim of the appellant company was fraudulent and even a belated one in as much as the bills were to be presented on 15th March 2003, the maturity date was 15th March 2005 and thus no action was taken by the claimants nearly for about 2 years.

2. Keeping in view the above stand of the parties, the learned Company Judge, vide the impugned order, dismissed the company petition relegating the appellants to invoke the proper jurisdiction of filing a civil suit. The relevant finding in the impugned judgment reads as under:

> "In these circumstances, the defence of the company that the goods were returned to the original suppliers who had issued credit notes and that the claim that has been now set up in the company petition is vitiated by fraud cannot be brushed aside. It cannot be said that there is a debt due and payable and a certain sum of money is due and payable to the petitioner. Photocopies of the two bills of exchange have been produced before the court and it has been submitted that the endorsement in favour of the petitioner on the reverse of the bills of exchange is ex facie, even upon a bare perusal, forged. These are obviously disputed questions which will have to be addressed on the basis of evidence at the trial of a suit. Suffice to st ate, that no case for the exercise of the jurisdiction for winding up is made out. That apart, the attention of

the court has also been drawn to the financial status of the respondent and the following averment in that regard is contained in paragraph 3(c) of the affidavit in reply:

“The reserves of the respondent are to the tune of Rs.4613 crores and the assets employed are t the tune of Rs.6094 crores. The sales and other income of the respondent was Rs.13748.26 crores in the year 2004-05 and have increased to Rs.15198.63 crores in 2005-06. The respondent had made a profit before tax and extraordinary items of Rs.1286.14 crores in the year 2004-05, which has increased to Rs.1313.65 crores in the year 2005-06. This respondent's net worth in the year 2005-06 was Rs. 4640 crores and its General Reserves for the year 2005-06 is Rs.2496 crores”.

Therefore considered from any perspective, this is an appropriate case where the petitioner must be relegated to the remedy of establishing its claim in a civil suit before an appropriate court of jurisdiction. The company petition is accordingly dismissed”.

3. The correctness of the aforesaid finding is questioned in the present appeal, primarily on the ground that the claim of the appellant company could not be termed as fraudulent as the bills of exchange had been endorsed in their favour and apparently no payments had been made. The letter dated 27th February 2003 had no bearing and the claim of the appellant was based on the bills of exchange and the defence raised by the respondents was a sham one, as such the winding up petition ought to have been admitted. It is also argued that the bills of exchange was never cancelled and gave rise to a subsisting cause of action in favour of the appellants.

4. It is a settled principle of law that the jurisdiction of the Company Court to admit a winding up petition is a special and limited jurisdiction and the court in its discretion would always relegate the petitioner in a winding up petition to the remedy of a civil suit as it may raise complex issues and there is reasonable defence raised by the respondent to the claim of the petitioner in that petition. The provisions of section 433(e) of the Companies Act, 1956 clearly postulate that the company is unable to pay its debt. The inability to pay the debt has to be coupled with an intent of wilfull default. In

other words, the debtor in a winding up petition should have defaulted to clear its debt, despite notice and without any reasonable cause.

5 The jurisdiction to wind up a company court is an equitable jurisdiction, normally founded on accepted cannons of equity in law. The statutory provisions of the Companies Act vest wide discretion in the company court to examine the petition in a wide spectrum and then exercise its discretion in accordance with the settled principles. In the case of Harinagar Sugar Mills Co. Ltd. Bombay vs M .W. Pradhan, Court Receiver, High Court, Bombay, AIR 1966 SC 1707 the Supreme Court observed that a winding up petition is perfectly proper remedy for enforcing payment of just debt and the court held as under:

> "It is true a winding up order is not a normal alternative in the case of a company to the ordinary procedure for the realisation of the debts due to it, but nonetheless it is a form of equitable execution. Propriety does not affect the power but only its exercise".

The above dictum of the Supreme Court explains the scope of a winding up petition but it has to be founded to claim a just debt.

The debt which ex facie is disputable in law and on just, equitable and bonafide defence and the court is of the view that the controversy raised could be appropriately raised in a civil suit and the nature of the disputes to be determined is complex, in such circumstances exercise of discretion by the court relegating the petitioner to a civil suit can hardly be questioned.

In the case of M/s Madhusudan Gordhandas and Co. vs Madhu Woolen Industries Pvt Ltd, AIR 1971 SC 2600 the stated principles for exercise of this jurisdiction are as under:

> "Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chooses not to pay that particular debt (see Re. A company 94 SJ 369). Where however there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely (see Re Tweds Garages Ltd 1962 Ch 406). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law and thirdly

the company adduces prima facie proof of the facts on which he defence depends”

Again in the case of Industrial Credit and Investment Corporation of India Ltd vs M/s Srinivas Agencies & ors, JT 1996 (5) SC 405, the observation is that there cannot be a strait jacket formula in regard to the maintainability or otherwise of a winding up petition and further observed that the discretion has to be exercised keeping in view the facts and circumstances of each case. The court held as under:

> “The real controversy is as to when a winding up court should get transferred to itself a pending proceeding initiated by secured creditor; and when a winding up court should grant leave to the secured creditor t pursue his remedy in the civil court, despite winding up order having been passed. Shri Salve brought to our notice, on the first aspect of the controversy, a decision of two Judge bench decision of this court in Central Bank of India v Elmot Engineering Company, JT 1994(7) SC 54 = 1994(4) SCC 159. It was held therein that the aim of section 446 is to safeguard the assets of the company against wasteful or expensive

litigation as far as matters which could be expeditiously and cheaply decided by the company court. It was also observed that while granting leave under this section the court always takes into consideration whether the company is likely to be exposed to unnecessary litigation and cost.

In this context, it would be apposite and useful to note what was stated by a three-Judge bench in Sudarsan Chits (1) Ltd vs O. Sukumaran Pillai, 1984 (4) SCC 657, which has traced the historical evolution as well as the present setting of section 446(2). A need for such a provision was felt because section 171 of the predecessor Act had only provided for stay of suits and proceedings pending at the commencement of winding up proceeding, along with the embargo against the commencement of any suit or other legal proceedings against the company except by the leave of the court. That provision, with little modification, was re-enacted in sub-section (1) of section 446. There was thus no specific provision conferring jurisdiction to the court winding up the company analogous to the one conferred by sub-section (2), which was introduced to enlarge the jurisdiction of the winding up

court so as to facilitate the disposal of winding up proceedings. This sub-section, as originally enacted, did .not meet with the requirement fully, with the result that the committee appointed for examining comprehensive amendment to the Companies Act recommended that “a suit by or against a company in winding up should notwithstanding any provision in law for the time being be instituted in the court in which the winding up proceedings are pending”. The committee made this recommendation having noticed that on winding .up order being made and the official liquidator being appointed, he has to take into his custody company property as required by section 456., Then, section 457 confers power on the liquidator to sell the properties of the company and to realise the assets. The committee felt that at the stage when winding up order is made, the company may as well have subsisting claims and to realise these claims the liquidator will have to file suits. To avoid this eventuality and to keep all incidental proceedings in winding up before the court, its jurisdiction was required to be enlarged to entertain petition, amongst others, for recovering the claims of the company. To

give effect to this recommendation, sub-section (2) was suitably amended to bring it to its present form by the Companies (Amendment)Act, 1960. The amendment obviated the need of filing of suits by the liquidator (which are prolix and expensive) to realise and recover the claims and subsisting debts owed to the company; and instead, provided a cheap and summary remedy by conferring the required jurisdiction on the company court.

We are, therefore, of the view that the approach to be adopted in this regard by the company court does not deserve to be put in a straight jacket formula. The discretion to be exercised in this regard has to be depended on the facts and circumstances of each case. While exercising this power we have no doubt that the company court would also bear in mind the rationale behind the enactment of Recovery of Debts Due to the Banks and Financial Institutions Act, 1993, to which reference has been made above. We make the same observation regarding the terms which a company court should like to impose while granting leave. It need not be stated that the terms to be imposed have to be reasonable, which would , of

course, vary from case to case. According to us, such an approach, would maintain the integrity of that secured creditor who had approached the civil court or desires to do so, and would take care of the interest of other secured creditors as well which the company court is duty bound to do. The company court shall also apprise itself about the fact whether dues of workmen are outstanding; if so, extent of the same. It would be seen whether after the assets of the company are allowed to be used to satisfy the debt of the secured creditor, it would be possible to satisfy the workmen's dues pari passu".

Usefully a reference can also be made to a judgment of the Karnataka High Court in the case of T. Srinivasa vs Flemming (India) Apotheke Pvt Ltd, 1990 (68) Company Cases 506, which dealt with the scope of the winding up petition at some length and observed that the procedure under section 433(e) of the Companies Act being a summary procedure and whenever the court is of the opinion that the defence raised is bonafide and is likely to succeed in the civil court, it would constitute sufficient reasons for rejecting the winding up petition and relegating the parties to file a civil suit. The tests stated in

the above judgments are fully satisfied in the present case. The defence raised by the respondents in the company petition was prima facie bonafide. The pleas raised are relating to facts as well as law. Furthermore undue delay in invoking the provisions of law even upon maturity of the bills of exchange by the petitioners is a relevant consideration, which has been rightly noticed by the company court while exercising its discretion.

In light of the above principle, we may now revert back to the facts of the present case. There is no dispute that the bills of exchange were executed and were payable as on 15th March 2003. According to the respondents these bills of exchange were rendered inconsequential and ineffective vide letter dated 27th February 2003 wherein the Sky Impex Limited had informed the appellant company as follows:

> "This is to inform that goods supplied by us to yourselves under contract No.SKY/L&T/ALPET/2002 dated September 15th 2002 and against our Invoice No.560 T dated 15th December 2002 and Bill of Exchange for US$ 980,000 dated 15th December, 2002 have been received back by ourselves at Dubai.

Hence no outstanding are due from Larsen & Toubro Limited to Sky Impex Limited, against the above mentioned Invoice and Bill of Exchange".

6. The above letter clearly shows that the beneficiary of the bills of exchange had issued no claim in relation to these bills of exchange and, therefore, their endorsement per-se would not justify the undisputed claim by the appellant company in the present petition. In a winding up petition the delay itself is a relevant consideration and no justification whatsoever has been rendered by the appellant company as to the circumstances or reasons for which the company took no steps for recovering its amount, particularly before invoking the limited jurisdiction of the court under section 433 of the Companies Act. The stand taken by the respondent in reply to the company petition raises genuine and bonafide dispute and at least prima facie offers proper explanation in law for its plea of no liability. This would certainly require a regular trial and parties may be called upon to lead evidence in support of their respective pleadings. The issues raised are certainly complex as according to the respondents, the claim itself is fraudulent and motivated one. It may be useful to notice at this stage that the learned Company Judge has also adverted

to the financial status of the respondent company. With that kind of financial status there is hardly any possibility to conclude at the stage of the petition that the company has wilfully defaulted to pay its debt. In addition to such stand it was also argued before the Company Court that the two bills of exchange stated to be endorsed in favour of the appellant company show particularly with reference to the reverse of the bills of exchange that they have been forged. This controversy can hardly be properly examined in a winding up petition. The order relegating the petitioner to take recourse to legal remedy of filing a civil suit cannot be faulted with. Thus the judgment under appeal neither suffers from any factual or jurisdictional error. There is also merit in the contention raised that the notice dated 4th February 2005 was withdrawn by a subsequent notice dated 13th February 2005. The language of the subsequent notice as also recorded by the company court, besides being similar, could lead to a reasonable conclusion that the appellant company did not intend to pursue the claim any further to its first notice.

7. The appeal is dismissed, while leaving the parties to bear their own costs. However, we may make it clear that any observations made in this order would be of no consequence

and in no way would influence the court in the event the appellant company chooses to file a civil suit.

CHIEF JUSTICE

SMT RANJANA DESAI,J.